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No. 352

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN B. BEARD and HELEN B. BEARD, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court wrote no opinion. The District Court's findings of fact and conclusions of law (R. 44-71) are not officially reported. The opinion of the Court of Appeals (Pet. v-xv) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. xvi) was entered on May 26, 1958. Taxpayers' petition for rehearing was denied on July 8, 1958. (Pet. xvii.) The petition for a writ of certiorari was filed on September 10, 1958.

QUESTION PRESENTED

Whether the court below, on the facts of this record, was correct in holding that the real property involved was held by taxpayers primarily for sale to customers in the ordinary course of their trade or business, and in holding consequently that the profits from the sale of the property were taxable as ordinary income.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) Definitions.—As used in this chapter—

(1) [As amended by Section 151(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * * or real property used in the trade or business of the taxpayer.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The record consists of oral and written evidence. The findings made by the District Court were of ultimate fact only. (R. 44-69.) The court below made a

full statement of the facts disclosed by the evidence (Pet. vi-xiv); these are not substantially in dispute.

John B. Beard (hereinafter called taxpayer) is a member of the Beard family group, which consists of ten brothers and sisters, each of whom is a 10% stockholder and director in each of seven family corporations operated in and around Modesto, California. These include: Beard Land and Investment Company (hereinafter called L & I), a family holding company conducting extensive farming and business property operations; a short-line railroad; an ice, fuel and appliance business; a farming enterprise; a large public utility water company; and the Modesto Refrigerating Company, a large cold storage and quick freezing concern, of which taxpayer was president and general manager from 1926 until its sale in 1953. (Pet. vi.)

Three brothers were the active heads of all the businesses. In addition to his job at the refrigeration company, taxpayer had over-all supervision of City Ice and Fuel Company. He occasionally dropped in on other family businesses, particularly the railroad, but had only the one office at the refrigeration company. Customarily, he was at such office from 8 or 8:30 to 5:30 or 6 "with getting out during the day". He testified he spent something like one to five per cent of his time on his real estate properties, with such time coming "somewhere out of a 24 hour day". (Pet. vii.)

The five taxable years under review, 1946-1950, were those in which the greatest growth occurred in all the Beard family concerns. (Pet. vii.) In all but one of the five years, taxpayer's income from the

realty operations—*viz.*, sale of subdivision lots—was substantially higher than his salary as head of the refrigeration company. Income from real estate operations totalled $126,725.25. His total salary and other non-realty income for these same years was $85,905.20. (Pet. xiv.)

According to the Government's figures, derived from the county records, 558 lots in which taxpayer held an interest were transferred during the five years in question, the totals for each year being successively, 97, 100, 49, 174, and 138, for the period 1946-1950. Gross sales of real estate in which taxpayer had an interest (Pet. xiii) were:

1946	$ 95,347.16
1947	62,817.85
1948	54,219.45
1949	148,501.40
1950	125,094.98
Total	$485,980.84

A summary of taxpayer's real estate interests and activities, as found by the court below, which resulted in these sales and income is as follows:

In 1932 taxpayer purchased the 12 acre Las Palmas tract of 40 lots, which, by 1936, immediately adjoined the Modesto city limits. The first sales were made in 1936 or 1937 and at that time an adjacent tract was also for sale by others. Sales by taxpayer were handled through a Mr. Hopkins, a real estate agent, and he sold 30 lots by 1941, all but two of the 40 being sold by that time. (Pet. viii.)

The first tract purchased by taxpayer which produced income during the taxable years was the 25

acre Wilson No. 1, tract, adjacent to Las Palmas and 600 feet from the city limits at the time of purchase in 1937. It had been platted for subdivision by the former owners in 1924. Taxpayer had a 50% interest in the property with two of his sisters. The first sale of a lot was within a year of acquisition, in 1938, and the last was in 1948. Hopkins again was the exclusive agent on a commission basis until 1942, but taxpayer sold a few lots himself to close friends without any solicitation on his part. Taxpayer had nothing to do with Hopkins' sales other than to sign the deeds, but admitted he had discussions with him about ideas to carry on sales and during 1941-1942 even helped him out on some of the advertising. There were no sales during the war and in 1945 L & I began handling the property. Taxpayer built four houses on this tract in 1940 and all were sold by 1942, some being sold by himself. (Pet. viii.)

In 1939, a year after acquiring Wilson No. 1, taxpayer began buying the farms which made up Wilson No. 2, again taking a 50% interest with two sisters. Other developments were opening up nearby at the time, and taxpayer personally secured the three Government permits and subdivided the tract in 1940. Roads were put in by L & I and water was put in by the family water company. In 1940 and 1941 taxpayer built 5 houses on this tract and sold all of them by 1942, either himself or through his brokers. As with Wilson No. 1, Hopkins was the sales agent until 1942, with taxpayer making a few sales at that time himself. Hopkins made all the contracts and handled all the details of sales he made.

In 1945 L & I became the exclusive sales agent and thereafter, taxpayer testified, he had nothing to do with the operations as to advertising, soliciting or making improvements. (Pet. viii-ix.)

The third tract from which sales were made during the taxable years was the 44 acre Thousand Oaks tract, which taxpayer acquired for himself in 1940. Taxpayer filed the original subdivision map himself. "I done a little preliminary work on it there in 1941 with the idea of going ahead and developing part of it and then had decided to do nothing with it and just let it set there." The tract was divided into 93 lots, and some street work was done and some of the curbs put in by taxpayer directly. L & I handled improvements after 1945 and all lots were sold by L & I between 1946 and 1950. (Pet. ix.)

The 58 acre Covena Park property was purchased in 1940 and 1941. The development was a large overall subdivision put together by L & I from this and other tracts not owned by taxpayer's family. L & I prepared the necessary legal papers for subdividing, put in all the improvements under its own supervision and made all sales. Taxpayer signed the deeds and L & I deducted expenses from the monthly payments on account to taxpayer. All of the 104 lots in this tract were sold quickly, during the 1946-1948 period. (Pet. ix-x.)

A small area between other tracts already owned by taxpayer, known as Wilson No. 3, was eventually divided into 45 lots. Eight acres were acquired in 1941 and 2 additional acres to round out the tract were acquired in 1946. Taxpayer held a 50% interest

in the property, again with two sisters. When acquired in 1941, the land was probably the closest property to Modesto still available for subdivision. L & I was made the exclusive sales agent in 1945. It put in the streets and the family water company put in the water. Sales began in 1946 and all lots were sold by the end of the year. (Pet. x.)

The final purchases made by taxpayer during the years in question were in the Alta Vista tract. In 1945 two ranches beyond Covena Park were offered by their owners to L & I. Taxpayer testified that L & I "didn't care to buy it and it was decided—a group of us got together and decided to buy it as individuals." The properties were taken by taxpayer as trustee for a group of seven brothers and sisters, each owning one-seventh. A third ranch of 10 acres was similarly acquired in 1946, making a total of 68 acres ultimately divided up into 215 lots. The sale of lots began in 1946 under L & I direction and most were sold within a two year period: 112 in 1949, and 92 in 1950 (the Government figures secured from the county land records were 147 and 115 for each year, respectively). Sale of this property "was very rapid" and only one sale was made after 1950. (Pet. x-xi.)

After the war, L & I was made the exclusive agent for development and sale of the various properties in which taxpayer had an interest. A fully executed agreement with L & I was introduced with respect to only one tract, the 10 acre Wilson No. 3 property. A copy of a similar agreement bearing only the signature of Walter Beard, president of L & I, was

introduced with respect to the 28 acre Covena Park tract in which taxpayer had an interest with this same brother and two sisters. A similar, but undated and unsigned, copy of an agreement was introduced with respect to the 44 acre Thousand Oaks tract owned by taxpayer. No written agreements were introduced for Wilson No. 1 or Wilson No. 2 tracts totalling 47 acres, and none were produced for the Alta Vista trust properties which totalled 68 acres. All agreements that were made were prepared by taxpayer's attorney, the husband of the sister of taxpayer who was secretary of L & I. In the usual agreement L & I was made the exclusive sales agent for five years at a specified commission rate but with the owners retaining power to make sales themselves. Prices were to be fixed by agreement between the owners and L & I, and L & I was to supervise development, deducting its expenses from the monthly remittances to the owners. L & I was to bear the expense of advertising, solicitation, and collection. (Pet. xi.)

During the time in question, Walter Beard, president of L & I, had a broker's license and the company operated a real estate department at a separate office in Modesto. It "never ran what I [taxpayer] would say was a very active office," but employed two to four salesmen under direction of a manager, Clyde Oden. According to taxpayer, the office was set up primarily to handle company-owned properties and other properties not owned by taxpayer which the company was selling as exclusive agent. The manager testified that taxpayer's properties were "a very minor part" of the office's operations. (Pet. xi-xii.)

L & I was employed as taxpayer's agent, taxpayer testified, because it was in a position to render a more complete service than any other local agent and it was the most convenient method. The possible profit to L & I, which would eventually accrue in part to taxpayer as a stockholder, was not a consideration because it was "such a minor thing." Nor, according to taxpayer, was L & I retained because of taxpayer's ability to control its activities as a director, since he testified that his only control was exercised through his interest as owner of the properties. L & I's board of directors met monthly, but taxpayer recalled no discussion of sales of his properties at those meetings. He admitted that following the meetings on occasion the members of the Trust Group which owned the Alta Vista tracts discussed the affairs of their group. (Pet. xii.)

Taxpayer recalled no specific discussions with L & I on how to promote the property, other than those which just developed in the normal course of an agent-owner relationship. He did admit that he asked questions and made suggestions on how the properties should be advertised or promoted. The manager of the office testified that he talked to taxpayer very infrequently, possibly four or five times a year in taxpayer's office when he was there to have deeds signed. Taxpayer was always interested in what progress was being made and what steps were being taken, but never came to the realty office itself. (Pet. xii-xiii.)

Taxpayer estimated that Modesto's population was around 15,000 in 1941 and about 60,000 at the time of trial, the greatest growth having taken place during the years in question, since 1945. The area of taxpayer's properties was a natural place for subdivision and well adaptable for that purpose. Taxpayer stated that it was not more adaptable than other places around Modesto, though, and that other areas developed at a far faster rate. (Pet. xiii.)

Upon the basis of these facts, the Court of Appeals concluded that the land purchased and subdivided was property held primarily for sale to customers. Considering the crucial question to be whether the holding was for sale in the ordinary course of taxpayer's business, the court below rejected, as clearly erroneous, the trial court's finding that it was not. (Pet. xiv.) Accordingly, the judgment of the trial court was reversed. (Pet. xvi.)

ARGUMENT

The decision below turns on the facts of the particular case, there are no conflicting decisions, and no question of general importance is presented. The decision, furthermore, is correct.

The court below carefully considered the entire record and, unlike the District Court, made explicit findings as to the evidentiary facts. Moreover, these facts, as so found, are substantially not in dispute; the issue throughout has been with respect to the conclusions to be drawn from them. Contrary to taxpayer's contention (Pet. 16), the Court of Appeals was left with the definite and firm conviction that a mistake

had been committed and accordingly was warranted in reversing the District Court's finding as clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; *United States* v. *Gypsum Co.*, 333 U.S. 364, 395, rehearing denied, 333 U.S. 869; *Bistline* v. *United States* (C.A. 9th), decided May 13, 1958 (58-2 U.S.T.C., par. 9640); *Gillette's Estate* v. *Commissioner*, 182 F. 2d 1010 (C.A. 9th).

Upon the basis of the record facts, as stated in its opinion, the court below was plainly correct in finding that the over-all picture of the family enterprises, and taxpayer's association with them, demonstrated that the purchase, subdividing, and sale of real estate was sufficiently extensive to bring his activity within the definition of the statute. Internal Revenue Code of 1939, Section 117(a)(1), *supra*, p. 2. (Pet. xiv.) Certainly, in order to come within the meaning of trade or business, the purchase and sale of real estate need not be the sole business of a taxpayer. *Achong* v. *Commissioner*, 246 F. 2d 445 (C.A. 9th); *Friend* v. *Commissioner*, 198 F. 2d 285 (C.A. 10th); *Gamble* v. *Commissioner*, 242 F. 2d 586 (C.A. 5th); *Snell* v. *Commissioner*, 97 F. 2d 891 (C.A. 5th); *Oliver* v. *Commissioner*, 138 F. 2d 910 (C.A. 4th); *Di Lisio* v. *Vidal*, 233 F. 2d 909 (C.A. 10th); *Fackler* v. *Commissioner*, 133 F. 2d 509 (C.A. 6th). Nor does any doubt exist that a taxpayer may be engaged in business, within the meaning of the statute, through agents. *Achong* v. *Commissioner*, *supra*; *Richards* v. *Commissioner*, 81 F. 2d 369 (C.A. 9th); *Welch* v. *Solomon*, 99 F. 2d 41 (C.A. 9th); *Gamble* v. *Commissioner*, *supra*.

Contrary to taxpayer's contention (Pet. 16-29), there are no conflicting decisions. Each case in this field turns upon its particular facts, and necessarily no two cases are alike. The Government has, therefore, consistently urged the inappropriateness of Supreme Court review in cases of this kind. *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9th), certiorari denied, 342 U.S. 814; *King* v. *Commissioner*, 189 F. 2d 122 (C.A 5th), certiorari denied, 342 U.S. 829; *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Pool* v. *Commissioner*, 251 F. 2d 233 (C.A. 9th), certiorari denied, 356 U.S. 938. The same considerations underlay the Government's determination not to seek certiorari in *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5th), *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C.A. 5th), and *Curtis Co.* v. *Commissioner*, 232 F. 2d 167 (C.A. 3d).

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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